Colgate-Palmolive Company *and* Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union. Case 32-CA-2559

July 23, 1981

DECISION AND ORDER

On February 6, 1981, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the Administrative Law Judge's rulings, findings, and conclusions and to adopt her recommended Order, as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Colgate-Palmolive Company, Berkeley, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 2(a) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Although the Administrative Law Judge correctly stated that the General Counsel did not seek backpay or reinstatement for employee Robert Evelyn, she inadvertently included in her recommended Order a requirement that Respondent make available to the Board payroll and other records. We shall therefore delete that provision.

Evelyn was denied his right, under *Climax Molybdenum Company, a Division of Almax, Inc.*, 227 NLRB 1189 (1977), to a preinterview consultation with his union steward. However, reinstatement is not appropriate here because the steward did participate in all stages of the disciplinary interview as well as in the postinterview investigation leading to Respondent's decision to discharge Evelyn. Respondent even provided time during the interview for the requested private consultation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through representatives of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all these things except to the extent that membership in a union may be required pursuant to a lawful union-security clause.

Accordingly, we give you these assurances:

WE WILL NOT refuse to permit any of our employees to consult with their union representative prior to an investigatory interview where the employee has reasonable grounds to believe that the matter to be discussed may result in his or her being the subject of disciplinary action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

COLGATE-PALMOLIVE COMPANY

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This matter was heard by me in Oakland, California, on October 16 and 17, 1980. The charge was filed by Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, herein called the Union, on March 12, 1980, and served on Colgate-Palmolive Company, herein called Respondent, on March 13, 1980. The complaint, which issued on May 29, 1980, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act.

The principal issue herein is whether Respondent unlawfully refused to permit employee Robert Evelyn to consult with his union steward prior to an investigatory interview which Evelyn has reasonable cause to believe would result in disciplinary action against him.

Upon the entire record including my observation of the demeanor of the witnesses, and after due consideration of the post-hearing briefs filed by the parties, I make the following:

FINDINGS OF FACT

1. JURISDICTION

At all times material herein, Respondent, a Delaware corporation with an office and place of business in Berkeley, California, has been engaged in the manufacture of soap products. During the 12-month period preceding the issuance of the complaint here, Respondent, in the course and conduct of its business operations, sold and shipped goods or services from said facility in excess

of $50,000 directly to customers located outside the State of California, and purchased and received goods or services at the said facility valued in excess of $50,000 directly from suppliers located outside the State of California.

The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

On the morning of February 6, 1980,[1] employees Robert Evelyn and Tony Salcedo engaged in an altercation on Respondent's premises during working hours. Later that morning, Supervisor Greg Sevey and Plant Nurse Elodie Littleford reported to Neil Neilson, employee relations manager at Respondent's Berkeley plant, that Salcedo said Evelyn had hit him during an argument over whether the door between a processing area and a dock should be open or closed. Littleford further said that she was concerned because Salcedo appeared to be in a daze, that there was the possibility of a concussion and she was arranging for him to go to the company doctor. Neilson asked if Sevey observed the altercation. Sevey said he did not.

Neilson asked Sevey to have Evelyn report to his office. Neilson then telephoned Jim Maxwell, manager of the area where Evelyn worked, and asked him to come to his office. When Sevey and Evelyn arrived, Evelyn was instructed to wait in the reception area. Sevey went into Neilson's office and again related what Salcedo had told him regarding the altercation. Maxwell arrived shortly thereafter and Sevey left. Neilson arranged for a union steward to report to his office and then related to Maxwell what Sevey and Littleford had told him. Shortly thereafter, Neilson went into the reception area and told Evelyn he would be with him in a few minutes. Evelyn asked if Rose Arnold, chief union steward, was coming to the office. Neilson said Arnold was not available but Rick DeGolia, assistant chief union steward, would be there.

About 20 minutes after Evelyn arrived in the reception area, DeGolia arrived. According to DeGolia, he was given no prior information as to why he had been summoned to Neilson's office, nor had he heard about any altercation between Evelyn and Salcedo. When he arrived at the reception area, he asked Evelyn why he (Evelyn) was there. Evelyn said he was not sure. DeGolia said that something must have occurred for Evelyn to be there. Evelyn said there had been an altercation between him and Salcedo. They had just begun to discuss what had occurred when Neilson came into the reception area.

DeGolia further testified that as Neilson approached them, DeGolia asked Evelyn if he wanted to continue their discussion. Evelyn said he did. Neilson said he wanted to get started. DeGolia said he and Evelyn wanted to continue their discussion but that they would be brief. Neilson said DeGolia could talk to Evelyn after he (Neilson) finished. DeGolia said they had the legal right to confer prior to an investigatory interview that could lead to discharge or discipline. Neilson replied, "[Y]ou can talk to him after I'm done." They then went into Neilson's office. DeGolia said he and Evelyn were there under protest, that they had a right to confer prior to the interview and that he was charging Neilson with a violation of federal labor law. DeGolia specifically referred to the *Climax Molybdenum* case.[2]

Neilson's testimony in this regard is in substantial accord with that of DeGolia with two exceptions. Neilson testified that DeGolia's reference to the *Climax* case was made in the hallway as they were walking from the reception area to Neilson's office. Neilson, Maxwell, and Evelyn did not relate in their accounts of the interview that DeGolia made any statement at the beginning of the interview that he and Evelyn were there under protest and had a right to prior consultation. Neilson further denies that in the reception area DeGolia asked Evelyn if he wanted to continue their consultation. Evelyn testified that after Neilson said they would have to confer later, DeGolia asked him (Evelyn) if he still wanted to talk to DeGolia and he replied that he did. DeGolia admits that he may not have asked Evelyn this in Neilson's presence but rather as Neilson was walking toward them. He also admits that it is possible that the reference to Climax was made to Neilson in the hallway prior to entering Neilson's office.

When they entered the office, Maxwell was there. Neilson began the interview by stating that he had received information that Evelyn had hit Salcedo. Neilson asked what happened. Evelyn explained that the area where he usually worked was very warm and when he had to come downstairs into a larger area the change in temperature created a health problem for him resulting in a lot of colds. Therefore, he wanted the door to the loading dock closed so as to avoid drafts. Salcedo wanted the door open because his particular job was a hot one. So they had a longstanding problem as to whether the door would be open or shut. A previous supervisor had resolved the problem by having the door open for a half day and closed for a half day. DeGolia asked if Evelyn had informed his current supervisor of the problem. Evelyn said he had but the supervisor had not yet resolved the problem. DeGolia said he felt the supervisor had inadequately performed his duty and that was where the real responsibility lay.

Maxwell asked if Evelyn had worked a double shift that day or the day before. Evelyn said he had. Evelyn said he believed that other employees had been agitating this dispute between him and Salcedo. He said as often as he would close the door, Salcedo would reopen it and stand there laughing. Evelyn said he finally went over

[1] All dates herein will be in 1980 unless otherwise indicated.

[2] *Climax Molybdenum Company, a Division of Amax, Inc.*, 227 NLRB 1189 (1977), enforcement denied 584 F.2d 360 (10th Cir. 1978).

and told Salcedo he was tired of "messing around with him." Salcedo raised his hands and Evelyn thought Salcedo was going to hit him.

Neilson said his information was that Evelyn had hit Salcedo. Evelyn said that things had gotten rather heated but he definitely did not remember hitting Salcedo. Neilson asked Evelyn if he hit Salcedo. According to DeGolia, Neilson asked this question more than once, without an answer from Evelyn, and after Neilson kept pressing for an answer, DeGolia advised Evelyn that he did not have to answer the question. Neilson and Maxwell testified that Neilson had asked the question only once when DeGolia gave this advice. Evelyn testified that he did not hear the question that prompted the advice from DeGolia and that he indicated that he had not heard the question and said he could not answer a question he had not heard.

At this point, DeGolia said he wanted to caucus with Evelyn. Neilson said he had more questions to ask and Evelyn and DeGolia could talk later when he had finished. Neilson asked a few more questions. He then asked Evelyn if he had anything else to say. Evelyn said no. At some point, Evelyn also said that if Sevey had taken care of the matter the day before, the situation would not have developed. Neilson then gave Evelyn and DeGolia permission to leave the office to confer.[3]

After Evelyn and DeGolia left, according to Maxwell and Neilson, they made no decision as to what, if any, disciplinary action would be taken, but both did say that it appeared that Evelyn had hit Salcedo. Maxwell asked what would happen if it was proven that Evelyn hit Salcedo. Neilson said that according to the collective-bargaining agreement, it was a dischargeable offense. Maxwell said he hoped it did not turn out that way because Evelyn was a good employee whom he wanted to keep.

During the 10 to 15 minutes that Evelyn and DeGolia conferred, DeGolia asked Evelyn if he had hit Salcedo. Evelyn said he could not remember. DeGolia said he thought Evelyn would be discharged, that Respondent had a history of not being very lenient about fights, that they obviously believed that Evelyn had been in a fight and it did not look good. DeGolia further said he thought the best they could hope for would be a suspension, which would probably be more than a week. DeGolia also said that there had been a few instances when a suspension was imposed in lieu of discharge.

According to DeGolia, they were in the reception area 5 or 10 minutes. According to Neilson and Maxwell, it was 10 or 15 minutes. According to DeGolia and Evelyn, the conference terminated when Neilson came into the reception area and asked them to return to the office. According to Neilson and Maxwell, it terminated when DeGolia and Evelyn knocked on the door of Neilson's office and indicated that they had completed their conference.

The interview continued with Neilson accusing Evelyn of lifting a rubber mallet and threatening Salcedo with it. Evelyn said he did not know what Neilson was talking about and denied it. Neilson summarized the information he had, said he thought Evelyn was lying, that he had hit Salcedo, and further said that Evelyn was suspended indefinitely pending further investigation. According to DeGolia, he said something regarding a suspension, his goal being to try for a suspension rather than a discharge. He does not recall exactly what he said. Nothing further was said and DeGolia and Evelyn left.

Later that day, Neilson interviewed four other employees, including Salcedo, with regard to the incident. Maxwell and DeGolia were present at all the interviews. According to him, he made the decision to discharge Evelyn on Friday, February 8. On Saturday, Evelyn was notified to report to Neilson's office on Monday, February 11. Evelyn telephoned Rose Arnold, chief union steward, and requested that she be present. On Monday, Neilson, Arnold, Maxwell, and Evelyn met in Neilson's office. Evelyn testified without contradiction that Neilson said they were not going to go over everything, that they could not have any fighting on company property. He said Salcedo had been given a week's suspension for harassment and that, as of then, Evelyn was terminated.

It is undisputed that the Evelyn interview followed Neilson's usual pattern for conducting an investigatory interview which could lead to disciplinary action against the interviewee. The usual pattern is for a union steward to be present regardless of whether the employee makes a specific request for the steward. Typically, the steward has no knowledge of why he or she is summoned to the office prior to arrival there. Usually the interview commences with Neilson making a statement as to the nature of the alleged misconduct. He asks the employee to describe what occurred, to respond to the allegation. There is usually some discussion of what led to the incident in question and of the incident itself.

Typically, if the offense involved is serious, there will be a recess which may or may not be requested by the union. If the union requests a recess, it is always granted but generally not until after Neilson has completed his questioning of the employee. Sometimes Neilson announces the discipline to be imposed after they return from the recess and sometimes he does not announce it until a later time.

Neilson testified that the reason he denied DeGolia's request for prior consultation with Evelyn was because he felt it would impede his attempts to learn the truth. According to him, it has been his experience through the years in investigating various situations which could lead to disciplinary action that stewards or other union representatives try to block his attempts to ascertain the truth. Specifically, union stewards allegedly often advise employees that they do not have to answer a question posed by Neilson. Although both Neilson and Maxwell testified that this latter has occurred numerous times, both of them could only recall details as to one or two such incidents.

B. *Conclusions*

In *N.L.R.B.* v. *Weingarten Inc.*,[4] the Supreme Court affirmed the Board's determination that under Section 7

[3] With the exception noted above, what occurred during this portion of the interview, is undisputed and the account herein is a composite of the testimony of Maxwell, DeGolia, Evelyn, and Neilson which I find more accurately reflects what occurred.

[4] 420 U.S. 251 (1975).

of the Act an employee has the right, upon request, to the presence of a union representative at an investigatory interview which the employee reasonably believes will result in disciplinary action. In *Climax Molybdenum Company, a Division of Amax, Inc.*,[5] the Board further determined that this right encompasses the right to prior consultation with the union representative. In explication of its rationale therefor, the Board stated:

> . . . [T]he Supreme Court in *Weingarten* noted:
>
> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. [*Weingarten, supra*, at 262–263.]
>
> Surely, if a union representative is to represent effectively an employee "too fearful or inarticulate to relate accurately the incident being investigated" and is to be "knowledgeable" so that he can "assist the employer by eliciting favorable facts, and . . . getting to the bottom of the incident," these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts. Additionally, a fearful or inarticulate employee would be more prone to discuss the incident fully and accurately with his union representative without the presence of an interviewer contemplating the possibility of disciplinary action. These considerations indicate that the representative's aid in eliciting the facts can be performed better, and perhaps only, if he can consult with the employee beforehand. To preclude such advance discussion, as our colleagues would, seems to us to thwart one of the purposes approved in *Weingarten*. Nothing in the rationale of *Weingarten* suggests that, in its endorsement of the role of a "knowledgeable union representative," the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeability implies the very opposite. The right to representation clearly embraces the right to prior consultation.

The record establishes, and Respondent does not dispute, that the nature of the interview was such as to give rise to the *Weingarten* right to union representation; and that Evelyn and DeGolia were not permitted to confer prior to Neilson's questioning of Evelyn. However, Respondent contends that in the circumstances herein, it did not by its conduct, deprive Evelyn of his *Weingarten* rights. The basis for this argument is threefold. One, Respondent contends, the right to prior consultation is one which must be invoked by the employee, which was not the situation here. Two, Respondent met its obligations under *Weingarten and Climax Molybdenum* when it permitted Evelyn and DeGolia to confer privately during Evelyn's investigatory interview, at a time when Respondent's investigation into Evelyn's misconduct was just beginning. Three, since union stewards frequently advise employees that they do not have to answer questions during investigatory interviews, permitting preinterview consultation would violate the teachings of Weingarten by making the full disclosure of facts less likely, transforming interviews into adversary contests and interfering with the employer's legitimate prerogative to investigate misconduct dangerous to other employees.

I find that the record does not support the basic factual foundation of this latter argument. Thus, although Neilson and Maxwell testified that union stewards frequently advised employees that they did not have to answer questions, Maxwell could cite no one specific incident and Neilson could cite only one. I do not credit this testimony. If this was such a frequent occurrence, they should have been able to recall specifics from at least some of the "numerous" incidents. The best they could do in this regard was Maxwell's testimony that Tom Scatina was the steward who was famous for advising employees that they did not have to answer questions.[6] Further, this alleged advice was given during the interviews, not during preinterview consultations.

Respondent argues in this regard that "to expect stewards to give different advice, ignores a basic theme of the union movement—members stick together." The Board majority rejected this same argument in *Climax Molybdenum, supra*, stating:

> Nor will prior consultation, as the dissent suggests, cause unions to bring "pressures to bear on an employee to withhold the facts." Apart from the wholly speculative attribution of such conduct to unions, the fact remains that a union representative so inclined could engage in such conduct about as effectively at the interview as in talks with the employee prior to the interview. If we had to speculate, we would guess that lack of prior consultation would strongly incline an employee representative to those obstructionist tactics as a precautionary means of protecting employees from unknown possibilities. Perhaps all we are really suggesting is that knowledge is a better basis than ignorance for the successful carrying on of labor-management relations.

The Board has also answered Respondent's argument that no request for prior consultation was made by Evelyn. It is undisputed that DeGolia requested prior consultation in Evelyn's presence and that Evelyn did

[5] 227 NLRB 1189–90.

[6] Other witnesses referred to Scatina's conduct when he was chief steward and assistant chief steward. This is the same Scatina who refused to answer questions, when called in for an interview as to the Evelyn-Salcedo incident, on the grounds that right, wrong, or indifferent he did not want to become involved in any interview which could result in disciplinary action against a fellow union member.

not disavow such request. In *Climax Molybdenum*, the Board majority stated:

> Our dissenting colleagues' final argument is that no violation of Section 8(a)(1) occurred here, even if employees have a right to prior consultation, because the employees did not request an opportunity to confer with union representatives prior to the interview. This argument lacks merit because the collective-bargaining agreement between the parties provided for union representation at such an interview. *Even if it did not*, the Union must have the right to a preinterview consultation with the employee in order to advise him of his rights to representation if that right is in reality to have any substance, for it is the knowledgeable representative who as a practical matter would be informed on such matters. *Thus, since, in our view, the right to representation includes the right to prior consultation, the denial of this right upon the Union's request is a denial of represenation.* [Emphasis supplied.]

I also find no merit in Respondent's final argument that it met its obligation when it permitted Evelyn and DeGolia to confer privately during Evelyn's investigatory interview, at a time when its investigation was just commencing. Admittedly, Neilson permitted Evelyn and DeGolia to confer only after Neilson had concluded his questioning and even though Neilson's investigation continued, this interview in fact concluded Evelyn's role therein. He had already told his story or refused to do so. Thereafter, the opportunity to take a different approach was certainly more limited than it might have been prior to the interview. Thus, the conference probably came too late to have much practical effect.

If the right to prior consultation is to have any meaning, it must in fact be granted prior to the investigatory interview. Effective representation requires a knowledgeable representative who has had "an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts. . . . [T]he representative's aid in eliciting the facts can be performed better, and perhaps only, if he can consult with the employee beforehand." *Climax Molybdenum, supra.*

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by refusing to permit Assistant Chief Union Steward DeGolia to consult with Evelyn prior to an investigatory interview which Evelyn reasonably believed would result in disciplinary action against him.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to permit employees to consult with their union representatives prior to investigatory interviews which they reasonably believed would result in disciplinary action, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.[7]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Colgate-Palmolive Company, Berkeley, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to permit any of its employees to consult with their union representatives prior to an investigatory interview where the employee has reasonable grounds to believe that the matter to be discussed may result in his or her being the subject of disciplinary action.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this recommended Order.

(b) Post at its facility in Berkeley, California, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

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[7] The General Counsel does not seek, nor does the record support, a make-whole remedy. *Kraft Foods, Inc.*, 251 NLRB 598 (1980).

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."